

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Dkt. No. 02-33
Access to the Internet over Wireline)	
Facilities)	
)	
Universal Service Obligations of)	
Broadband Providers)	
)	
Computer III Further Remand)	CC Dockets Nos. 95-20, 98-10
Proceedings: Bell Operating Company)	
Provision of Enhanced Services; 1998)	
Biennial Regulatory Review -- Review of)	
Computer III and ONA Safeguards and)	
Requirements)	

To: The Commission

REPLY COMMENTS OF HIGH TECH BROADBAND COALITION

**Business Software Alliance
Consumer Electronics Association
Information Technology Industry Council
National Association of Manufacturers
Semiconductor Industry Association
Telecommunications Industry Association**

Kevin DiLallo
Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, N.W., Suite 900
Washington, D.C. 20036
202-857-2550
Attorneys for the
High Tech Broadband Coalition

July 1, 2002

Summary

The High Tech Broadband Coalition ("HTBC") supports the Commission's tentative conclusion that wireline broadband Internet access service is an interstate information service. As such, it should be subject to minimal regulation, consistent with the Commission's historical approach to information services and its limited statutory authority to regulate such services. A minimally regulated environment will spur innovation, investment, and deployment of new broadband facilities.

At the same time, HTBC recognizes that numerous independent Internet service providers ("ISPs") have made significant investments and built their businesses in reliance on the availability of wireline broadband transmission services. In the long run, intermodal competition among multiple broadband platforms may lessen the reliance of independent ISPs on wireline facilities. HTBC is concerned, however, that complete elimination of the existing requirement that incumbent local exchange carriers ("ILECs") make broadband transmission service available on a stand-alone basis could displace ISPs that are not affiliated with ILEC broadband providers and harm the customers of those ISPs. Accordingly, the Commission should maintain its policy that requires ILECs who provide affiliated ISPs with a broadband transmission service to make the same transmission service available to unaffiliated ISPs on a non-discriminatory basis. Wireline broadband providers, including the ILECs, should be permitted to negotiate privately the terms of new broadband transmission service arrangements with ISPs. However, the ILECs should make any such

arrangements with their affiliated ISPs available to unaffiliated ISPs on terms that are the same. As intermodal broadband competition increases, the need for these minimal safeguards may disappear. "The Commission should therefore revisit these requirements in two years. Any continuing regulation should be imposed in a competitively neutral manner.

Open and unfettered consumer access to content, services, and applications, accessible through an ever-increasing diversity of products, has fueled the growth of the Internet and the information technology industry. Preservation of that open and diverse marketplace of ideas and products is key to the continued growth of the Internet and the development of the innovative services and information technologies that depend on it. Accordingly, the Commission's policies for broadband transmission services should be guided by four consumer "connectivity principles" that have made the Internet what it is today. Specifically, the Commission's policies should ensure that consumers are able to:

- (1) obtain meaningful information regarding any technical limitations of their broadband transmission service;
- (2) receive unrestricted access to their choice of Internet content consistent with their bandwidth capacity;
- (3) run applications of their choice, consistent with their bandwidth capacity, that do not harm the provider's network; and
- (4) attach any devices of their choosing that operate within the agreed bandwidth and do not harm the provider's network or enable theft of service.

The Commission should vigilantly monitor the emerging broadband marketplace for compliance with these principles and take appropriate action to ensure that

consumers are not being denied the benefits of the Internet and unrestricted use of the full bandwidth to which they have subscribed.

Contents

	<u>Page</u>
Summary	i
INTRODUCTION	2
DISCUSSION	4
I. WIRELINE BROADBAND INTERNET ACCESS SERVICE IS AN INFORMATION SERVICE THAT SHOULD BE SUBJECT ONLY TO MINIMAL REGULATION.	4
A. Wireline Broadband Internet Access Service Is an Information Service.	4
B. The Commission Should Ensure the Continuing Availability of Broadband Service Arrangements for ISPs	5
II. THE COMMISSION SHOULD MONITOR THE MARKET FOR WIRELINE BROADBAND INTERNET ACCESS SERVICE TO ENSURE CONSUMER CHOICE.	8
A. Important "Connectivity Principles" Have Fueled the Growth of the Internet and Should Be Protected.	9
B. Broadband ISPs Are In a Position to Restrict Consumer Choice.	11
C. The Commission Should Monitor Provider Conduct and Take Action, If Appropriate..	12
CONCLUSION	12

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Dkt. No. 02-33
Access to the Internet over Wireline)	
Facilities)	
)	
Universal Service Obligations of)	
Broadband Providers)	
)	
Computer III Further Remand)	CC Dockets Nos. 95-20, 98-10
Proceedings: Bell Operating Company)	
Provision of Enhanced Services; 1998)	
Biennial Regulatory Review -- Review of)	
Computer III and ONA Safeguards and)	
Requirements)	

REPLY COMMENTS OF
HIGH TECH BROADBAND COALITION

The High Tech Broadband Coalition ("HTBC" or the "Coalition")¹ submits these Reply Comments to the comments filed in response to the Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.²

¹ The Members of the High Tech Broadband Coalition include the: Business Software Alliance, Consumer Electronics Association, Information Technology Industry Council, National Association of Manufacturers, Semiconductor Industry Association, and Telecommunications Industry Association.

² *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, CC Dkts. Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002), 67 Fed. Reg. 9232 (February 28, 2002).

For the reasons set forth below, the Commission should adopt its tentative conclusion that wireline broadband Internet access is an information service that should be subject only to minimal regulation. Consistent with this classification, the Commission should allow the market for wireline broadband Internet access service to develop with little regulatory intervention. The Commission should, however, ensure that information service providers ("ISPs"), including Internet service providers, who are not affiliated with a wireline broadband service provider, are able to obtain from incumbent local exchange carriers ("ILECs") the same broadband transmission services that the ILECs currently provide to their affiliated ISPs under non-discriminatory rates, terms, and conditions. The Commission's policies for this market should protect the interests of consumers and the connectivity principles set forth below.

INTRODUCTION

Ensuring that consumers can realize the full benefits of the Internet should be a paramount goal of the Commission, and the Commission should remain vigilant for signs of anti-consumer behavior on the part of wireline broadband service providers that interferes with consumers' realization of those benefits. If it detects such behavior, the Commission should take appropriate action to preserve or restore consumers' rights.

HTBC supports the Commission's overarching objectives in this proceeding, as expressed in the NPRM, namely: (1) accelerating deployment of broadband capabilities; (2) "promoting the continued development of the Internet

and other interactive computer services";³ (3) "promoting the development and deployment of multiple platforms [to] ensure the needs and demands of the consuming public are met";⁴ (4) fostering investment and innovation in broadband infrastructure;⁵ and (5) developing an analytical framework that is consistent among multiple platforms.⁶

The rapid deployment of broadband services is essential to maintaining the pace of technological progress and the nation's economic expansion. HTBC believes that the Commission's broadband policy must encourage continued deployment of infrastructure and services on multiple platforms, foster an environment of investment and innovation in competing technological alternatives for broadband services, and maintain the open and innovative market for information services and information technologies that use broadband transmission service as a crucial input. A minimally regulated environment for broadband transmission services will be conducive to innovation and investment in, and deployment of, new broadband facilities.

³ *Id.*, at ¶ 3 (quoting 47 U.S.C. § 230(b)(1)).

⁴ *Id.*, at ¶ 4.

⁵ *Id.*, at ¶ 5.

⁶ *Id.*, at ¶ 6.

DISCUSSION

I. WIRELINE BROADBAND INTERNET ACCESS SERVICE IS AN INFORMATION SERVICE THAT SHOULD BE SUBJECT ONLY TO MINIMAL REGULATION.

A. Wireline Broadband Internet Access Service Is an Information Service.

There is broad support among the parties filing initial comments⁷ for the Commission's tentative conclusion that wireline broadband Internet access service is an interstate information service.⁸ HTBC joins those commenters in endorsing the Commission's tentative conclusion in this regard.

As the Commission has correctly observed, "wireline broadband Internet access services fuse communications power with powerful computer capabilities and content,"⁹ and therefore fall squarely within the "information services" classification. In its *Report to Congress* on universal service, the Commission described "Internet access services" as services that "alter the format of information through computer processing applications such as protocol conversion and interaction with stored data."¹⁰ The Communications Act defines an "information service" in pertinent part as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

⁷ See, e.g., Comments of AOL Time Warner Inc. in CC Dkt. No. 02-33 (filed May 3, 2002) ("AOLTW Comments") at 5; Comments of Verizon in CC Dkt. No. 02-33 (filed May 3, 2002) ("Verizon Comments") at 7; Comments of SBC Communications Inc. in CC Dkt. No. 02-33 (filed May 3, 2002) ("SBC Comments") at 16.

⁸ NPRM at ¶ 17.

⁹ NPRM at ¶ 13.

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (April 10, 1998) at 11516-17, ¶ 33 (citations omitted).

making available information via telecommunications" ¹¹ Based on these definitions, wireline broadband Internet access service is unambiguously an information service.

B. The Commission Should Ensure the Continuing Availability of Broadband Service Arrangements for ISPs.

In the past, HTBC has recommended to the Commission an environment of minimal regulation for broadband transmission services. ¹² HTBC has advocated reliance on competitive market forces with respect to other services, and it has found that this approach enhances facilities-based competition, promotes deployment, and improves consumer welfare. Consistent with that position, as well as with the Commission's traditional approach to information services, ¹³ and Congressional intent, as expressed in the Telecommunications Act of 1996, ¹⁴ wireline broadband Internet access service should be subject only to minimal regulation.

¹¹ 47 U.S.C. § 153(20).

¹² See Comments of High Tech Broadband Coalition in GN Dkt. No. 00-185, CS Dkt. No. 02-52, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities – Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, (filed June 17, 2002) ("HTBC Cable Modem Comments"); Comments of High Tech Broadband Coalition in CC Dkts. Nos. 01-338, 96-98 & 98-147, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability* (filed April 5, 2002) ("HTBC UNE Unbundling Comments").

¹³ See *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (April 10, 1998) at ¶¶ 23-27, 73-82.

¹⁴ In Section 706 of the Communications Act, 47 U.S.C. § 157 nt, Congress required the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing [among other things] regulatory forbearance . . . or other regulating methods that remove barriers to infrastructure investment." Similarly, in Section 230(b) of the Communications Act, 47 U.S.C. § 203(b), which was added by the 1996 Act, Congress expressed the goal of "preserv[ing] the vibrant and competitive free market that presently exists

HTBC applauds the FCC for recognizing its limited statutory jurisdiction over information services,¹⁵ and its historical hands-off approach to regulating those services. Indeed, consistent with this de-regulatory approach, HTBC filed comments in the *Triennial Review* advocating regulatory freedom from Section 251 unbundling for the ILECs' last-mile broadband facilities.¹⁶ There are, however, both legal and public policy grounds for continuing very targeted and limited regulation of wireline broadband transmission service, to the extent explained below.

The Commission has asked whether it should require facilities-based providers of wireline broadband Internet access service to offer their underlying broadband transmission service to unaffiliated ISPs.¹⁷ While HTBC believes that it is appropriate for the Commission to give wireline broadband transmission service providers flexibility to develop new broadband service arrangements, it is concerned that eliminating all regulation of those services immediately could lead to displacement of ISPs that are unaffiliated with ILECs. Both Verizon and SBC have committed on the record in this proceeding to continue providing

for the Internet and other interactive computer services, unfettered by Federal or State regulation."

¹⁵ See NPRM at ¶ 39 (Commission has limited jurisdiction over "enhanced services" under Title I of Communications Act)' see also *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Dkt. No. 96-149 (Order on Remand), 16 FCC Rcd 9751 at 9758-59 (2001) (information service providers are not subject to common carrier regulation under Title II of the Communications Act).

¹⁶ HTBC UNE Unbundling Comments, *supra*, note 12, at 26-45.

¹⁷ NPRM at ¶¶ 44-52.

broadband transmission service to unaffiliated ISPs,¹⁸ and HTBC sees these commitments as encouraging. Nevertheless, the expectancy interests and sunk investment of unaffiliated ISPs and the reliance of their customers on uninterrupted service warrant continuation of the existing requirement that ILECs offer to unaffiliated ISPs the same broadband transmission services that the ILEC provides to its affiliated ISP at non-discriminatory rates, terms, and conditions.¹⁹

HTBC recommends that the Commission require ILECs to honor their existing transmission arrangements with unaffiliated ISPs. The Commission should allow the ILECs to negotiate privately the terms of their broadband access arrangements with such ISPs; however, the ILECs should make any arrangements with their affiliated ISPs available to unaffiliated ISPs in a non-discriminatory manner. The Commission should take whatever additional action is necessary to facilitate enforcement of these minimal standards.

At the same time, because intermodal broadband competition is increasing, as the Commission has observed,²⁰ unaffiliated ISPs may in the future have expanded alternatives to wireline broadband services that may make this limited requirement unnecessary. Thus, the Commission should revisit the

¹⁸ Verizon Comments at 31; SBC Comments at 25.

¹⁹ Although cable modem service has a larger share of the broadband market than wireline broadband service, far more independent ISPs have existing access arrangements with wireline providers than with cable providers; therefore, the potential impact of widespread displacement of independent ISPs is of greater concern with respect to wireline broadband providers.

²⁰ NPRM at ¶¶ 12, 44.

need for this requirement in two years. Any continuing regulation should be imposed in a competitively neutral manner.

II. THE COMMISSION SHOULD MONITOR THE MARKET FOR WIRELINE BROADBAND INTERNET ACCESS SERVICE TO ENSURE CONSUMER CHOICE.

By any measure, the growth of the Internet has been remarkable. To a large degree, the Internet has flourished because of the Commission's deregulatory, market-based approach to information services. Since the early days of the Internet, consumers have enjoyed open and unfettered access to sites and freedom to choose equipment and applications used on, or in conjunction with, the Internet. An unprecedented array of content, services, and applications is available to consumers today, accessible through an ever-increasing diversity of products.²¹ And as technology gradually improves, consumers' choices should continue to widen. The Commission can and should monitor the development of the broadband marketplace to ensure that this happens.

Cable and ILEC broadband service providers' ISPs will have enormous influence over consumers' access to Internet content and consumers' ability to run applications using their broadband connection or to attach devices of their choosing to that connection. In its Comments in the companion *Internet Over Cable* proceeding, HTBC cited several examples of cable ISPs imposing

²¹ HTBC's constituents include some of the world's leading creators of the products, services, and applications the Internet has spawned.

restrictions on consumers through their subscription agreements.²² Although it does not appear that such restrictions are as widespread among wireline broadband ISPs, the Commission should vigilantly monitor the wireline broadband Internet access market to ensure consumer choice as the wireline broadband market develops. Should the Commission identify restrictions that represent a substantial threat to consumers' free use of their broadband service, it should take appropriate action.

A. Important "Connectivity Principles" Have Fueled the Growth of the Internet and Should Be Protected.

One of the most beneficial steps the Commission can take to foster the development of consumer broadband services is to vigilantly monitor the market for those services – including both wireline and cable modem broadband services²³ -- and take appropriate action, if necessary, to protect four important principles:

1. Consumers have a right to meaningful information regarding technical limitations of their service.
-

To make informed choices from among different broadband providers, consumers require clear disclosures regarding the bandwidth and functional limitations of each of their service offerings. Thus, before consumers select a service plan and agree to price and term commitments, providers should inform

²² As the Coalition noted there, such restrictions may be nothing more than attempts to manage customer usage of bandwidth on a shared facility that may disappear as superior business and technical arrangements can be implemented, or in response to competitive pressures. See HTBC Cable Modem Comments, *supra* note 12, at 10-12.

²³ HTBC has filed comments with similar recommendations in the *Internet Over Cable* rulemaking, CS Dkt. No. 02-52. See *supra*, note 12.

them of the upstream and downstream bandwidth limitations, and of any capacity limits on content transfers, that apply to the various plans available to them.

2. Consumers should have unrestricted access to their choice of Internet content using the bandwidth capacity of their service plan.
-

Among the Internet's greatest achievements is the ability it gives consumers to access any information, at any time, from any place. It is crucial that consumers of wireline broadband Internet access service continue to have this ability. Broadband service providers' ISPs should impose no restrictions on the sites their subscribers can reach within the technical limits of their service plans.

3. Wireline broadband customers should be allowed to run applications of their choice, within the bandwidth limits of their service plans, as long they do not harm the provider's network.
-

Not only should consumers be able to reach any sites that are within their service plan's bandwidth limits, they should also be allowed to use that bandwidth to run whatever applications they choose, provided that they do not harm the provider's facilities. As an example, wireline broadband service providers' ISPs should not be permitted to restrict consumers from running a virtual private network ("VPN") or similar application merely because it involves inbound access to the user, appears to be "server-like," or is otherwise unconventional.

4. Consumers should be permitted to attach any devices they choose to their ISP connection, so long as they operate within the agreed bandwidth, do not harm the provider's network, or enable theft of services.
-

Consumer freedom to attach devices to providers' networks is a longstanding tenet of Commission jurisprudence.²⁴ Wireline telecommunications carriers have lived with the Commission's Customer Premises Equipment ("CPE") requirements²⁵ for decades, and these requirements have spawned innovation and investment in both CPE and the services with which it is interconnected. In keeping with this tradition, consumers should be able to attach devices of their choosing to their wireline broadband Internet access service as long as they do not harm the network or enable theft of service. For example, consumers should not face restrictions on the IP address configuration of their home networks. Nor should they be charged for multiple device addresses in an IPv6 environment where addresses are no longer a limited resource.

B. Broadband ISPs Are In a Position to Restrict Consumer Choice.

As noted above, ILEC broadband providers and their ISP affiliates can influence or restrict consumer choice through their subscriber agreements and other tactics. Through press reports and filings at the Commission and

²⁴ See, e.g., *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), *recon. denied*, 14 F.C.C.2d 571 (1968); *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (released December 11, 1996) (one of Commission's goals is "to encourage robust competition for manufactured products").

²⁵ See, e.g., 47 C.F.R. Part 68.

elsewhere, the Coalition has learned of troubling actions by certain wireline broadband providers and their ISP affiliates.

Some wireline ISPs appear to be pursuing strategies that will enable them to discriminate in favor of their own content. For example, ILECs have insisted on contractual provisions that enable them to override bandwidth allocations to an ISP and degrade the ISP's service quality when their customers access ILEC-provided services, such as video-on-demand, music subscription services, and interactive gaming.²⁶ Such actions by ILEC broadband providers or their ISP affiliates could seriously compromise the consumer freedom that has driven the Internet's expansion.

C. The Commission Should Monitor Provider Conduct and Take Action, If Appropriate.

It is too early to tell whether the foregoing actions are isolated occurrences or indicative of broader, more systemic problems; however, the Commission should vigilantly monitor wireline (and cable modem) broadband markets as they develop to ensure that consumer interests are protected.

CONCLUSION

The Commission should adopt its tentative conclusion that wireline broadband Internet access service is an information service for which a deregulatory approach is appropriate. Nevertheless, the Commission should require ILEC broadband providers to continue to honor existing arrangements with unaffiliated ISPs and to provide service to unaffiliated ISPs on non-

²⁶ HTBC will provide more information in this regard to the Commission upon request.

discriminatory rates, terms, and conditions. The Commission should revisit this requirement, in light of competitive conditions at the time, in two years.

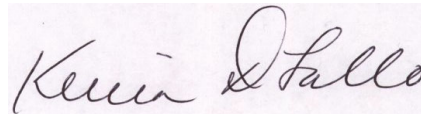
In addition, the Commission should monitor the wireline broadband market as the service develops to ensure that consumer choice is not being restricted. So long as a customer's use of broadband Internet access service is consistent with any bandwidth capacity limitations which are disclosed, and for which he has paid, and provided the customer does no harm to the wireline ISP's facilities, he

should be free to use his wireline broadband service with any applications or equipment, or to access any Internet sites, the customer desires.

Respectfully submitted,

**HIGH TECH BROADBAND
COALITION**

BUSINESS SOFTWARE ALLIANCE
CONSUMER ELECTRONICS
ASSOCIATION
INFORMATION TECHNOLOGY
INDUSTRY COUNCIL
NATIONAL ASSOCIATION OF
MANUFACTURERS
SEMICONDUCTOR INDUSTRY
ASSOCIATION
TELECOMMUNICATIONS INDUSTRY
ASSOCIATION



By: _____

Kevin DiLallo
Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, D.C. 20036
(202) 857-2550

July 1, 2002

Attorneys for the
High Tech Broadband Coalition

Certificate of Service

I, Michaelleen I. Williams, hereby certify that true and correct copies of the preceding Reply Comments of the High Tech Broadband Coalition were served this first day of July 1, 2002 via the FCC's Electronic Comment Filing System and via First Class mail upon the following parties:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554



Michaelleen I. Williams
Legal Assistant